

Legislative Analysis



HEALTH FACILITIES, AGENCIES, AND OCCUPATIONS: EXPANDED CRIMINAL BACKGROUND CHECKS

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House Bill 5166 (Substitute H-2)
Sponsor: Rep. Gary A. Newell

House Bill 5168 (Substitute H-2)
Sponsor: Rep. Paula K. Zelenko

House Bill 5167 as introduced
Sponsor: Rep. Michael C. Murphy

House Bill 5448 (Substitute H-1)
Sponsor: Rep. Barb Vander Veen

Committee: Senior Health, Security, and Retirement
First Analysis (12-6-05)

BRIEF SUMMARY: The bills would expand the requirements for criminal background checks for new employees at health facilities and agencies, adult foster care facilities, psychiatric facilities or intermediate care facilities, and for applicants for initial licensure or registration in health occupations. In each case, a request would be made to the Department of State Police to conduct a criminal history check and to forward fingerprints to the Federal Bureau of Investigation. The State Police would have to request the FBI to make a determination of any national criminal history pertaining to the applicant for employment, licensure, or registration.

FISCAL IMPACT: Most of the fiscal implications for state government in House Bills 5166 (H-2), 5167, 5168 (H-2), and HB 5448 (H-1) are anticipated to be offset by Medicaid and Medicare reimbursement funding assuming the Department of Community Health (DCH) secures the necessary federal approval or waiver.

House Bills 5166 (H-2), 5168 (H-2), and 5448 (H-1) will increase costs for the DCH.

House Bill 5167 and House Bill 5168 (H-2) will increase state costs.

More detailed information is found in the Fiscal Information section later in the analysis.

THE APPARENT PROBLEM:

A representative of the Department of Community Health has summarized the problem as follows.

Currently, Michigan's long term care criminal background check law applies only to Nursing Homes, County Medical Care Facilities, and Homes for the Aged and to Adult Foster Care facilities. For individuals in the state for more than three years, the check consists primarily of a "name" check on the Internet Criminal History Tool (ICHAT). Individuals who have not been in the state for at least three years are required to have an FBI fingerprint check. However, many long term care settings are not currently required to do background checks. This includes Psychiatric Hospitals, Hospices, Home Health

Programs, Long Term Care Hospitals, and ICF/MRs. Further, Michigan's current law does not fully meet federal standards because it does not include all prohibited offenses and substantiated findings under abuse and neglect as required by the Social Security Act.

The department also says that current testing takes too long. When an applicant signs an affidavit upon being hired, the applicant can work, temporarily, for 90 days – the time it takes for a background check to clear. Further, DCH says that unlike many other states, Michigan does not conduct criminal background checks on newly licensed health professionals under the Public Health Code. Legislation has been introduced to address this concern and put Michigan statutes in line with other states.

THE CONTENT OF THE BILLS:

The bills would amend the requirements for criminal background checks for new employees at health facilities and agencies and adult foster care facilities, and for applicants for initial licensure or registration in health occupations. In each case, a request would be made to the Department of State Police to conduct a criminal history check and to forward fingerprints to the Federal Bureau of Investigation. The State Police would have to request the FBI to make a determination of any national criminal history pertaining to the applicant for employment, licensure, or registration.

House Bill 5168 would add a new section to the Public Health Code (MCL 333.1101) to require background checks on new employees of a health facility or agency (a nursing home, county medical facility, hospice, hospital that provides swing bed services, home for the aged, or home health agency). House Bill 5166 would amend the Adult Foster Care Facility Licensing Act (MCL 400.734a) to apply the same requirements to adult foster care facilities. House Bill 5448 would amend the Mental Health Code (MCL 300.1134a) to require the same requirements to psychiatric facilities or immediate care facilities for people with mental retardation. House Bill 5167 would amend the Public Health Code (333.16146 et al.) to apply background check requirements to applicants for initial licensure or registration in health occupations. The bill would impose a nominal fee, beginning January 1, 2006, not to exceed \$2 for the processing of criminal history background checks for applicants for initial licensure or registration and renewals, and the applicants would be responsible for any charges for the criminal history check.

Enacting Sections. House Bills 5166, 568 and 5448 each contain enacting sections that would allow the bills to take effect 60 days after the appropriate state department secures federal approval of the necessary waivers to use federal funds to reimburse health care and adult foster care facilities for the costs incurred in requesting a national criminal history to be conducted by the Federal Bureau of Investigation (FBI) and then files with the Secretary of State a written notice that the approval has been secured. If the department secures the necessary waiver and files a written notice, the existing sections of law dealing with background checks would be repealed. House Bills 5166, 5168 and 5448 are tie-barred to each other.

The following is an more detailed description of the content of the bills.

House Bills 5166, 5168, and 5448

Under the bills, health facilities and agencies, adult foster care facilities and psychiatric or immediate care facilities , (to be called "facilities") could not employ, independently contract with, or grant clinical privileges to an individual who regularly has direct access to or provides direct services to patients or residents after the bill's effective date if 1) he or she had been convicted of either a felony or an attempt or conspiracy to commit a felony, unless fifteen years had lapsed since the individual completed all of the terms and conditions of sentencing, parole, or probation prior to application; 2) had been convicted of a misdemeanor that involved abuse, neglect, assault, battery, or criminal sexual conduct or fraud or theft; 3) had been convicted of a relevant federal crime; or had been the subject of a substantiated finding of neglect, abuse or misappropriation of property by the department.

Background Checks

A person who applied for employment or contract services or clinical privileges in a facility and had received a good faith offer of employment would have to give written consent along with acceptable identification, at the time of application, for the Department of State Police (DSP) to conduct a criminal history check.

After receiving the written consent form and identification from the applicant, the facility would make it available to the DSP and request a criminal history check on the applicant. The applicant would be required to provide a set of fingerprints to be forwarded to the Federal Bureau of Investigation (FBI). The DSP would request the FBI make a determination of the existence of any national crime history pertaining to the applicant. The facility would request that the DSP conduct a check of all relevant registries established according to federal regulations for any substantial findings of abuse, neglect, or misappropriation of property. The DSP would have to provide the facility with a report containing any criminal history record information on the applicant maintained by the department. If there is a charge for the criminal history check, it would be paid by the department or reimbursed with Medicaid and Medicare funding, as appropriate. The facility would be prohibited from seeking reimbursement from the applicant. The DSP would be required to provide the results of the FBI determination to the department within 30 days after the request were made.

If the requesting facility or agency is not a state department or agency and, if the criminal conviction is disclosed on the FBI determination, the department would be required to notify the health facility or agency and the applicant, in writing of the FBI determination without disclosing the details of the criminal conviction. The facility requesting the criminal history check would be responsible for paying fees for the FBI check and could not pass the cost on to the applicant. Further, the notice would also include a statement that the applicant has a right to appeal a decision made by the facility regarding his or employment eligibility based on the criminal background check. The notice would

include information regarding where to file the appeal and information describing the appellate procedures established under this section.

Exceptions. However, these provisions would not apply to individuals who were employed by, under independent contract to, or granted clinical privileges in a facility before the effective date of the bills. Further, those individuals could transfer to another facility without a criminal history check being conducted. If the individual is subsequently convicted, or is found to have been convicted of a crime or offense described under the previous subsections, he or she would be subject to the requirements of the subsection and may be denied employment.

In addition, the background check provisions would not apply to individuals who were independent contractors that offered services not directly related to the provision of services to a patient or resident or, if the services do allow for direct access to patients or residents, are not performed on an ongoing basis. The exception includes independent contractors providing utility, maintenance, construction, and communications services.

Conditional Employment

A facility could employ, contract with, or grant clinical privileges to an applicant as a conditional employee before receiving the results of the criminal history check as long as the criminal history check had been requested and the applicant signed a statement that he or she had not been convicted of a felony or the listed misdemeanor offenses; had not been the subject of a substantiated finding of neglect, abuse, or misappropriation of property; the subject of an order or disposition described under the code of Criminal Procedure, that he or she agreed that if the criminal history check did not confirm the applicant's statements, that his or her employment would be terminated; and the providing such incorrect information was a good cause for termination.

If the criminal history report did not confirm a conditionally-employed individual's signed statement, the facility would have to terminate the employment. Knowingly providing false information would constitute a misdemeanor punishable by up to 93 days' imprisonment and a fine of up to \$1,000, or both.

Confidentially

Information provided on a criminal history record could only be used for evaluating an applicant's qualifications, and a facility would be prohibited from disclosing information to a person who was not directly involved in evaluating the applicant's qualifications. An individual who knowingly disseminates criminal history would be guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than \$1,000, or both. An applicant who suffers injury as a result of a violation may bring a civil cause of action for damages against the person who committed the violation. In addition, a licensee, owner, administrator or operator of a facility who knowingly fails to conduct criminal history checks as required under this section is guilty of a misdemeanor punishable by up to one year imprisonment and a fine of up to \$5,000.00, or both.

Report to Legislature

Within one year after the effective date of the amendatory act, the department would be required to submit a written report to the Legislature regarding the impact, effectiveness, and the feasibility of implementing criminal history checks on volunteers who work in facilities who are involved in the licensing health facilities or agencies and regulation of its employees.

Employment Eligibility Appeal Board

Under House Bill 5168, the Department of Community Health would be required to establish an Employment Eligibility Appeals Board consisting of the following gubernatorial appointees: two representatives from the department's Bureau of Health Systems who deal primarily with the licensing of health facilities; two representatives of the Department of Human Services who deal primarily with the licensing of adult foster care facilities and homes for the aged; two members representing the public, and one member each representing providers, organized labor groups, and consumers of long-term care services.

Appeal Board Rules, Procedures, and Fees

The department would be required to promulgate rules for implementation of the Appeals Board and could promulgate rules to provide for an expedited administrative appeals process for certain non-violent crimes. The department could also charge a fee to cover the cost of the appeal.

Appeal Board Hearings

The appeal board would be required to hear and decide applications for appeal from applicants who have been disqualified from or denied employment by a health facility or agency based on a criminal background check conducted pursuant to the previous subsection.

The board would be required hear all appeals within 60 days of receiving the application. If the board finds, upon clear and convincing evidence, that the applicant was wrongly disqualified from or denied employment, it could grant the appellant a certificate of employability. If it deemed necessary, the board could impose conditions or limitations on the certificate to protect the health and safety of patients or residents within a health facility or agency.

Denial of Appeals

An individual convicted of a relevant crime, as described under the Public Health Code, would not have a right to appeal a denial of his or her employment with a health facility or agency. An individual convicted of a felony, (other than that described in the Public Health Code) involving abuse, neglect, assault, battery, criminal sexual conduct, fraud, or theft against a vulnerable adult, as that term is defined in the Michigan Penal Code, or a similar state or federal crime, would not have a right to appeal a denial of his or her employment with a health facility unless three years had elapsed since he or she completed all the sentencing, probation, and parole requirements and restitution for that conviction.

BACKGROUND INFORMATION:

The Department of Community Health provided the following information to the Committee on Senior Health, Security, and Retirement.

In September 2004, Michigan competed for and received federal approval as one of seven Federal Background Check Pilot Project states under the Medicare Modernization Act of 2004. As a pilot project state, Federal Centers for Medicaid and Medicare Services (CMS) has awarded \$5,000,000 over thirty months beginning in January 2005 to implement a model background check program consistent with federal requirements. The Michigan Criminal Background Checks Program is a collaborative partnership between CMS, Michigan Department of Community Health, Michigan Department of Human Services, Michigan State Police, and Michigan State University to expand and improve the criminal background checks for those employees working in or having direct client access in Michigan's long term care settings.

FISCAL INFORMATION:

House Bills 5166 (H-2), 5167, 5168 (H-2), and HB 5448 (H-1), as reported out of the House Senior Health, Security, and Retirement Committee, have fiscal implications for state government. However, most of the fiscal implications for state government are anticipated to be offset by Medicaid and Medicare reimbursement funding provided the Department of Community Health (DCH) secures the necessary federal approval or waiver. Furthermore, monetary sanctions included in the proposed bills could potentially offset some costs incurred by state government.

House Bills 5166 (H-2), 5168 (H-2), and HB 5448 (H-1) increase costs for the DCH due to imposition of new requirements for criminal history checks on employees of certain health facilities (nursing homes, county medical care facilities, hospices, hospitals that provides swing beds, homes for the aged, home health agencies, adult foster care facilities, psychiatric facilities, and intermediate care facilities for people with mental retardation) by the Department of State Police, with notification through the DCH. The provisions of the bills will also increase regulatory administrative costs for DCH and the Department of Human Services as they require the development and distribution of model forms, establishment of a new Employment Eligibility Appeal Board, and submission of written reports to the Legislature.

The DCH has received a 3-year grant of \$5.0 million to establish this criminal history check program on certain health facilities as a pilot, along with a number of other states, and to reimburse 100% of these costs. Following the grant period, the federal funding is expected to be continued at the 100% reimbursement level, according to DCH.

House Bill 5167 and House Bill 5168 (H-2) will increase state costs to cover the additional requirement for background checks on new and renewing health care professions licensees or registrants. The bills establish a maximum \$2.00 applicant fee for administrative processing of this information by the Department of Community

Health, and indicate that any charges for fingerprinting or criminal history checks shall be paid for the applicant.

ARGUMENTS:

For:

The Department of Community Health outlines six key features of the Background Checks Program:

*It would expand the scope of Michigan's laws and help to protect Michigan long-term care residents by ensuring that individuals with criminal backgrounds do not apply for employment at various long term care settings.

*It would strengthen the power and comprehensiveness of Michigan's criminal background checks to fully require compliance with all federal requirements and to require full federal fingerprint tests, state criminal checks, and checks of all state and national registries for findings of abuse, neglect and misconduct.

*It would provide due process by creating an appeal board and due process appeal rights for individuals wrongly denied employment.

*It would speed the process and enhance accuracy by creating an enhanced electronic infrastructure so that turnaround time for federal fingerprint checks can be reduced from 60-90 days to 2-8 days and at the same time increase accuracy.

*It would implement the Michigan Adult Abuse and Neglect Prevention (AANP) Training Program to provide tools for long term care workers and administrators to recognize abuse and neglect and respond appropriately.

*It would provide objective and rigorous evaluation of the effectiveness of the program by working with MSU and Federal CMS evaluators to assess the program's effectiveness in preventing prohibited individuals access to our vulnerable citizens and its efficiency in offering timely and accurate information to employers and job applicants.

Response:

While the concept of the more extensive FBI check compared to the State Police check is a good one, the new FBI check requirement may reduce the number of applicants for employment in adult foster care and home for the aged settings given the potentially intimidating nature of the fingerprinting process. It is important that the effectiveness of Michigan's new program for background checks be monitored to guard against adverse unintended consequences.

Against:

Critics argue that current law makes it difficult for many people to enter the health care field if there is any prior criminal background. Those convicted and imprisoned for check or welfare fraud are treated in the same way as someone convicted of rape or

aggravated assault. The opportunity to appeal is an important aspect of the bill as it will allow a redress of an error that could have a negative impact on an individual for his or her lifetime. Although it is important to ensure the safety of all health care facility patients there also must be employment options for non-violent ex-offenders to ensure they can become contributing members of society.

POSITIONS:

Department of Community Health supports the bills. (11-29-05)

AARP supports the bills (11-29-05)

Center for Civil Justice supports the bills (10-28-05)

Health Care Association of Michigan supports the bills. (11-29-05)

Michigan Association of Homes and Services for the Aging supports the bills (12-1-05)

Michigan Assisted Living Association supports the bills. (10-18-05)

Michigan County Medical Care Facilities Council supports the bills (12-1-05)

Michigan Home Health Association supports the bills. (11-29-05)

Michigan Protection and Advocacy Association supports the bills. (11-29-05)

Paraprofessional Healthcare Institute supports the bills. (11-28-05)

Department of Attorney General is neutral on the bills (11-29-05)

Service Employees International Union has indicated opposition to the bills. (12-1-05)

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.